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Parks v. Safeco Insurance Co. of Illinois Respondent's Brief Dckt. 43376

IN THE SUPREME COURT FOR THE STATE OF IDAHO

DAVID & KRISTINA PARKS, Plaintiffs-Appellants, vs. **SAFECO INSURANCE COMPANY OF ILLINOIS,** Defendant-Respondent.	Supreme Court No. 43376 Bannock County Case No. CV-2013-2253-OC

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

THE HONORABLE STEPHEN S. DUNN PRESIDING DISTRICT JUDGE

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STATEMENT OF THE CASE

A. INTRODUCTION

In 2012, a wildfire destroyed numerous homes in the Pocatello area, including Plaintiffs' residence at 9028 W. Autumn Lane, Pocatello, Idaho. Plaintiffs' residence was insured under a homeowner's policy issued by Defendant Safeco Insurance Company of Illinois ("Safeco"). Per the policy, Plaintiffs were entitled to either actual cash value (ACV) or cost incurred in replacing the home.

Immediately following the fire, Safeco retained the services of Robert K. Jones to provide an appraisal to determine the ACV of the home. After receiving the appraisal report, Safeco promptly issued a check to Plaintiffs for the ACV value of the home pending determination of the replacement cost.

Concurrently with the evaluation and payment of the ACV of the residence, Safeco attempted to learn from Plaintiffs if they intended on rebuilding the house or purchasing a different home. Although Plaintiffs were unsure, Safeco requested Belfor Property Restoration ("Belfor") to provide an estimate of the cost to rebuild the house. Even after receiving a copy of the Belfor estimate, the Plaintiffs were undecided on whether to purchase a different home or rebuild the house at Autumn Lane. Finally, in December 2012, Plaintiffs purchased a replacement home outside of Idaho Falls.

Despite repeated requests, Plaintiffs did not provide the purchase documents documenting the sale price of the new home, as requested by Safeco, until late May 2013. Upon receiving the documents, Plaintiffs promptly paid the difference between the ACV previously

disbursed and the Plaintiffs' replacement cost. Accordingly, Safeco complied with its contractual obligations and was entitled to summary judgment as determined by the District Court.

B. COURSE OF PROCEEDING BELOW

Plaintiffs' filed their Complaint on June 13, 2013. Defendant's Answer was filed on July 18, 2013.

Defendant filed its *Motion for Summary Judgment* on April 14, 2014. Subsequently, on May 7, 2014, Plaintiffs filed a motion pursuant to Rule 56(f), requesting additional time to conduct discovery and prepare a response, premised on Plaintiffs' representation that they needed additional portions of Defendant's electronic claims manual (CHARTS). Nevertheless, on or about May 13, 2014, Plaintiffs submitted a *Supplemental Affidavit in Reply to Defendant's Memo Opposing Plaintiffs' Rule 56(f) Motion* which set out Plaintiffs' argument in opposition to Defendant's summary judgment motion.

At the May 27, 2014 hearing on Defendant's summary judgment hearing, the District Court heard oral argument on the summary judgment motions, but granted Plaintiffs' Rule 56(f) motion on a limited basis, ordering that Plaintiffs could submit an affidavit based on the additional CHARTS documents.

On September 18, 2014, Plaintiffs filed their *Plaintiffs' Motion for Summary Judgment and to Amend,* together with a memorandum of law and the *Declaration of Charles M. Miller.* Defendant responded on February 9, 2015. The hearing on the cross-motions for summary judgment was held on February 25, 2015, and the District Court issued its written decision granting summary judgment to Defendant on April 23, 2015.

A judgment was entered on April 23, 2015. Plaintiffs appealed the April 2015 *Judgment* on June 2, 2015. An *Amended Judgment*, which included an award of costs to Defendant, was entered on October 7, 2015.[1] Plaintiffs did not appeal the latter judgment.

C. STATEMENT OF FACTS

1. Background and Fire

For approximately 19 years, Mr. and Mrs. Parks lived at a house located at 9028 West Autumn Lane in Pocatello, Idaho. **R. 14,** ¶ 4; **R. 522-523** (pp. 5-6). The house at Autumn Lane was destroyed in a fire on June 28, 2012. **R. 14,** ¶ 7. (Obviously, the lot was not destroyed in the fire, and, in fact, Plaintiffs still retain the lot). **R. 209** (p. 19, L. 22 – p. 20, L. 1); **R. 524** (p. 10, Ll. 6-8).

During the time the Parks lived at the Autumn Lane residence, it was insured through a policy issued by Safeco. **R. 523** (pp. 6, Ll. 6-8); **R. 210** (p. 24, L. 20 – p. 25, L. 3). Mrs. Parks testified that she never spoke to her insurance agent about the wording of the policy because she "felt it was understandable." **R. 523** (p. 7, Ll. 13-17). It is notable that Mrs. Parks has a bachelor's degree in English and two years of graduate schooling. **R. 523** (p. 7, Ll. 23-24). Mr. Parks is a licensed pharmacist. **R. 209** (p. 21, Ll. 6-19).

2. Appraisal of the Actual Cash Value and Payment

Immediately following the June 28, 2012, fire, Safeco hired an appraiser, Robert K. Jones, to determine the actual cash value (ACV) of the lost property—that is, "the market value of property in a used condition equal to that of the lost or damaged property, if reasonably available on the used market." **R. 341** ("Policy Definitions", ¶ 3(a)(2)). *See also* **R. 526** (p. 19, Ll. 4-6) (Mrs. Parks understood ACV to be market value); **R. 1014,** ¶ 3. Mrs. Parks understood

[1] The *Amended Judgment* was filed after the Clerk's Record had already been lodged with this Court, and, therefore, is not part of the record on appeal.

from the policy that Safeco would first pay the ACV, then deal with the replacement value once a replacement had been made. **R. 526** (p. 19, Ll. 11-20).

Mr. Jones prepared his report on July 21, 2012. *See generally*, **R. 374**, *et seq.*; **R. 1017,** Ex. A. In accordance with standard practices for appraisers, Mr. Jones determined the value of the home based on information from the Plaintiffs, Safeco, and the County Assessor's office, together with a comparison to the best comparable properties available in the Pocatello area market. **R. 1014-1015,** ¶¶ 5-6 and 11. Mr. Jones took into account that the house was a single story home with a finished walk-out basement in determining its market value. **R. 1015,** ¶¶ 7-10.

Mr. Jones appraised the total value of Plaintiffs' property at $244,000, representing $75,000 for the lot, and $169,000 for the structure. **R. 377**. A check for $169,000 was mailed to Plaintiffs on or about July 27, 2012. Plaintiffs acknowledge receiving the check. **R. 223** (p. 76, Ll. 13-15). Plaintiffs understood that the $169,000 payment was the ACV payment. **R. 528** (p. 27, Ll. 18-20; p. 28, Ll. 18-25).

Mr. Parks did not believe the process of the appraisal was incorrect, but that the appraised value was too low. **R. 234** (p. 120, Ll. 22-24). Mrs. Parks also believed that the ACV was too low. **R. 529** (p. 30, Ll. 12-15). Nevertheless, Plaintiffs never obtained a different estimate of the ACV. Prior to the fire, the Parks had not had the property appraised. **R. 212** (p. 30, Ll. 12-14); **R. 213** (p. 37, Ll. 12-21); **R. 523** (p. 9, Ll. 9-10). They had not received any offers to buy the home. **R. 212** (p. 30, Ll. 15-20); **R. 523** (p. 8, L. 22 – p. 9, L. 4).

Although Mr. Parks was surprised that the market value was not closer to the replacement value, he acknowledged that he did not have any grounds to argue with the appraisal of the market value of the home. **R. 222-223** (p. 73, L. 19 – p. 74, L. 8). Mr. Parks testified that he did not know what to think about the ACV amount because "I didn't know what the market was because we weren't looking." **R. 227** (p. 90, Ll. 11-16). He also did not ask or tell Ms.

Abendschein that he wanted to get his own market value appraisal. **R. 227** (p. 90, Ll. 17-21). In fact, Mr. Parks did not express any concern to her that he felt that the $169,000 valuation might be low, but merely assumed she would know he was upset. **R. 228** (p. 97, L. 3 – p. 98, L. 1). *See also* **R. 237** (p. 131, L. 25 – p. 132, L. 8) (admitting he did not have any additional conversations with anyone at Safeco concerning benefits under the policy). The Parks did not obtain their own appraisal. **R. 533** (p. 46, Ll. 2-3); **R. 536** (p. 60, Ll. 15-17).

Mr. Parks did, however, go to see Mr. Jones. *See, generally* **R. 232-233** (pp. 113-117). Mr. Parks testified that Mr. Jones told him the total amount of the appraisal, and that the amount included the value of the land. **R. 233** (p. 115, Ll. 22-25). Mr. Jones also explained that he was "strictly regulated by federal guidelines," and how those guidelines impacted his appraisal. **R. 233** (p. 117, Ll. 3-7). Mr. Parks thanked Mr. Jones and left. **R. 233** (p. 117, Ll. 9-10). Mr. Parks did not thereafter discuss with anyone about obtaining a different appraisal. **R. 234** (p. 118, L. 22 – p. 119, L. 1). And he did not speak with Ms. Abendschein again. **R. 234** (p. 120, Ll. 1-6). Moreover, Mr. Parks understood that he would receive additional funds if he rebuilt the house or purchased a different home. **R. 234** (p. 119, Ll. 2-18).

3. Communications Regarding the ACV Payment

In a separate letter to Plaintiffs dated July 27, 2012, Ms. Abendschein informed Plaintiffs that the $169,000 "has been sent to you [under a separate cover] for the Actual Cash Value of the dwelling ... per the enclosed Market Value appraisal." **R. 371**. Apparently after receiving the check, but before receiving the letter from Ms. Abendschein, Mr. Parks contacted her about the payment. *See generally* **R. 223-224** (pp. 75-79). In his conversation with her, Mr. Parks asked Ms. Abendschein whether the check was everything they were going to receive for their loss. According to Mr. Park's testimony, she replied: "No, this is just the beginning." **R. 223** (p. 76,

Ll. 20-25). Mr. Park indicated that Ms. Abendschein next began talking about options, explaining what "just the beginning meant," when he interrupted her to ask if that was all the Parks would get if they took money and ran. **R. 223-224** (p. 77, Ll. 3-7; 78, Ll. 4-8). Mr. Parks acknowledged that Ms. Abendschein had given him options as to obtaining coverage under the replacement cost, and that she had not told him that he and his wife's recovery was limited to the $169,000. **R. 228** (p. 95, L. 18 – p. 96, L. 2).

The Parks allege that they did not negotiate the check for $169,000 initially, and suggest that Safeco had not authorized them to cash the check.[2] **R. 15,** ¶ 11 and **R. 16,** ¶ 16. However, in his deposition, Mr. Parks admitted that Ms. Abendschein had not told him that the Parks could not cash the check. **R. 224** (p. 80, Ll. 11-16). He also testified that he and his wife "didn't need to cash the check." **R. 229** (p. 100, Ll. 10-11). If he had reservations about cashing the check or the amount, he did not raise it during his conversation with Ms. Abendschein at that time, or during later conversations or emails with her. **R. 224** (p. 80, Ll. 17-21); **R. 226** (p. 88, Ll. 2-20); **R. 227-228** (p. 93, L. 14 – p. 94, L. 3); **R. 229** (p. 100, Ll. 18-20). *See also* **R. 228** (p. 96, Ll. 5-14) (discussing August 1, 2002 email from Mr. Parks to Ms. Abendschein which only concerned issues of demolition and cleaning up the property). In fact, Mr. Parks acknowledged that he did not believe he had any reason to not cash the check. **R. 224** (p. 80, Ll. 22-25). He also admitted that there was nothing to prevent him from calling Ms. Abendschein about questions or concerns regarding the check. **R. 229-230** (p. 101, L. 21 – p. 102, L. 1). In fact, he had previously cashed a check for other coverage under the policy without any misgivings. **R. 229** (p. 101, Ll. 2-4); **R. 528** (p. 27, Ll. 21-25).

[2] The Parks eventually cashed the check in the fall of 2012. **R. 231** (p. 108, Ll. 24-25).

4. Communications Regarding Additional Amounts for the Structure

The July 27, 2012, letter discussed above further indicated that there was a total of $464,875 available coverage limits for replacing the property, but "[i]n order to claim the full replacement cost, you must replace the dwelling." **R. 371**. The letter referenced the relevant terms of the policy and informed Plaintiffs that "[w]e are in the process of obtaining a replacement cost bid for equivalent construction of your home. ... You may replace your dwelling on the existing location; build on a new location or purchase an existing home." **R. 372**. Ms. Abendschein also indicated that she "would like to review these options and discuss your replacement cost coverage in more detail with you." ***Id.***

Mr. Parks believed that he understood the contents of the letter, including the basis of the $169,000. **R. 224** (p. 81, Ll. 15-20). Mr. Parks admitted that, based on the letter, that the ACV or market value was just the starting point in adjusting the claim, and he had to make a decision on how to replace the property. **R. 225** (p. 83, Ll. 18-24). *See also* **R. 237** (p. 132, L. 23 – p. 133, L. 4) (admitting that Ms. Abendschein's letters indicated the Parks would get additional money when they replaced their house); **R. 531-532** (p. 38, Ll. 4-8; p. 38, L. 25 – p. 39, L. 6; p. 42, Ll. 8-11) (acknowledging that Ms. Abendschein's letters do not restrict recovery to ACV). Mr. Parks knew that Safeco would pay the full amount it cost to replace the dwelling when the Parks incurred the cost of such replacement. **R. 225** (p. 83, Ll. 5-17); **R. 238** (p. 137, Ll. 12-17). Mrs. Parks likewise understood Ms. Abendschein's communications as stating that "when we [the Parks] finally purchased a home that we would receive the cost." **R. 532** (p. 42, Ll. 17-19).

Mr. Parks also admitted that Ms. Abendschein set out the options available to the Parks, including replacing their dwelling at its existing location, build on a new location, or purchase an existing home. **R. 225-226** (p. 85, L. 2 – p. 86, L. 6). Mr. Parks also recollected Ms. Abendschein going over these same options with him via telephone. **R. 226** (p. 86, L. 24 – p. 87,

L. 2). Significantly, Mr. Parks testified that he understood from this information that whatever option he chose, Safeco would pay the lowest or smallest amount of what the Parks actually incurred. **R. 226** (p. 87, L. 19 – p. 88, L. 1); **R. 226-227** (p. 89, L. 23 – p. 90, L. 3); **R. 238** (p. 137, Ll. 12-17); **R. 238-239** (p. 137, L. 21 – p. 138, L. 5).

Mr. Parks acknowledged that the Ms. Abendschein had said to call anytime with questions, but that he did not ask her anything. **R. 225** (p. 82, Ll. 20-22); **R. 226** (p. 86, Ll. 7-11). Mrs. Parks likewise never raised any concerns with Ms. Abendschein. **R. 531** (p. 38, Ll. 9-13; p. 41, Ll. 1-4).

5. Cost of Replacement

Although Plaintiffs had not yet decided whether to rebuild the structure or purchase a different house,[3] on July 26, 2012, Safeco asked Belfor Property Restoration ("Belfor") for an estimate of the cost to replace the house—i.e., "the cost, at the time of loss, to repair or replace the damaged property with new materials of like kind and quality, without deduction for depreciation." **R. 343** "Policy Definitions", ¶ 3(m)(1)) (defining "replacement cost"). Mr. Parks understood that Safeco was going to obtain an estimate so the Parks would have that information when deciding what option to pursue. **R. 226** (p. 87, Ll. 13-18); **R. 227** (p. 90, L. 22 – p. 91, L. 1).

Belfore's estimate, dated September 13, 2012, indicated a total cost of $440,195.55, or, net of the $500 deductible, $439,695.55, to rebuild the Autumn Lane structure. **R. 429**. Mr. Parks remembered receiving the bid and accompanying letter for his review. **R. 230** (p. 104, Ll. 14-24). Mr. and Mrs. Parks understood the bid to be what it would cost to build a comparable home on the existing lot. **R. 230** (p. 105, Ll. 5-17); **R. 235** (p. 123, Ll. 10-22); **R. 235** (p. 125, Ll. 3-6); **R.**

[3] Mr. and Mrs. Parks testified that building a house on a different lot was never their plan. **R. 231** (p. 107, Ll. 6-9); **R. 530** (p. 35, Ll. 20-21).

532 (p. 43, Ll. 11-12); **R. 536** (p. 60, Ll. 18-21). Mr. Parks also understood that if it cost less to rebuild or replace the house, he and his wife would only receive the lesser amount. **R. 235** (p. 124, Ll. 1-6); **R. 236** (p. 126, Ll. 7-19); **R. 238** (p. 137, L. 21 – p. 138, L. 5). *See also* **R. 237** (p. 130, Ll. 10-16); **R. 239** (p. 139, L. 24 – p. 140, L. 16); **R. 251** (p. 188, Ll. 6-20).

Mr. Parks also acknowledged that Ms. Abendschein had not stated that the Parks would receive the full rebuild amount regardless of whether the Parks rebuilt the structure. **R. 235** (p. 125, Ll. 16-22). Mrs. Parks similarly acknowledged that to "incur" a cost, the Parks would have to actually spend something. **R. 532** (p. 42, L. 24 – p. 43, L. 6; p. 45, Ll. 2-23).

Mr. Parks testified that he had no concerns regarding the bid, and understood it to be just one of various options. **R. 234** (p. 121, Ll. 8-13). In that regard, Mr. Parks testified:

> Q. December 26, 2012, do you know what the basis was for Mr. Hawkes to be requesting $440,195.55 from Safeco?
>
> A. My feeling is that we lost what it would cost to replace. We weren't in the market to sell. So, the appraisal to me was of no benefit.
>
> Q. Okay. Now, you had an option to replace it, didn't you?
>
> A. Yes.
>
> Q. And Safeco would have paid you up to $440,195.55, correct?
>
> A. Yes.
>
> Q. But you chose not to use that option, didn't you?
>
> A. Yes.

R. 240 (p. 143, L. 23 – p. 144, L. 12). Mr. Parks acknowledged that there was no document where Safeco agreed to be bound by the $440,195.55 if the Parks did not rebuild on the Autumn Lane property. **R. 244** (p. 158, L. 24 – p. 159, L. 2). Mrs. Parks testified that no one with Safeco had promised to pay $440,195.55 regardless of how the Autumn Lane structure was replaced. **R.**

535 (p. 56, Ll. 6-13). In fact, as of the Plaintiffs' demand on December 26, 2012 (**R. 444** Exhibit 27) for $440,195.55, the Plaintiffs had not spent $440,195.55 or incurred that amount. **R. 536** (p. 58, Ll. 7-16). Mr. Park admits that his assertion of "actual loss" is premised, as he described it, on "my definition of actual loss is different than theirs"—that is, different from that in the Policy. **R. 247** (p. 172, Ll. 12-16).

6. Decision to Purchase a Different Home

Although the Parks began leaning toward the idea of purchasing another house rather than rebuilding on their lot, they still had not made a decision before mid-October 2012, nor had they started looking for a replacement home. **R. 231** (p. 107, L. 12 – p. 108, L. 23). By October 17, 2012, Mr. and Mrs. Parks had decided to not rebuild the structure. **R. 234** (p. 121, Ll. 14-19). *See also* **R. 245** (p. 165, L. 6); **R. 246** (p. 166, Ll. 11-14) (Mr. Parks confirming that they—the Parks—had chosen not to rebuild the destroyed home); **R. 534** (p. 50, Ll. 17-19 (Mrs. Parks testifying that they had decided to purchase an existing home). Rather, they purchased a home outside of Idaho Falls on December 6, 2012. **R. 236** (p. 128, Ll. 15-18).

The Idaho Falls property cost $300,000, including the value of the land.[4] **R. 240** (p. 143, L. 11-20). *See also* **R. 249** (p. 178, L. 3 – p. 179, L. 6 (describing sources of funds for the purchase). Mr. Parks admitted that he and his wife had not incurred $440,195.55 in costs, but that the figure only represented the amount in the bid. **R. 239-240** (p. 140, L. 24 – 143, L. 5); **R. 240** (p. 144, Ll. 16-24); **R. 242** (p. 150, Ll. 17-18); **R. 243** (p. 157, Ll. 11-16). The cost they actually incurred to replace their destroyed house was $300,000 (less the value of the land). **R. 242** (p. 151, Ll. 8-12). The Parks did not incur any rebuilding costs. **R. 246** (p. 168, L. 22 – p.

[4] Plaintiffs do not dispute the valuation assigned by the Company to the value of the underlying land or lot for the Idaho Falls property. **R. 537** (p. 65, Ll. 19-24).

169, L. 5); **R. 247** (p. 171, Ll. 9-11). They never paid Belfor any amount to rebuild the house at Autumn Lane. **R. 248** (p. 175, Ll. 2-18).

The Parks received the closing documents after they purchased the Idaho Falls residence, and started moving in by mid-December 2012. **R. 236** (p. 129, Ll. 2-9). *See also* **R. 535** (p. 57, Ll. 16-22) (Mrs. Parks stating that the Parks had moved into the Idaho Falls home by December 20, 2012, and received the closing documents by that time). Plaintiffs' counsel informed Safeco in his December 26, 2012, letter that "[t]he Parks have exercised their option to 'purchase an existing home' referenced on page 2 of your July 31, 2012, letter; they have purchased an existing home in the Idaho Falls area, having chosen to *not* rebuild in the barren, burned environment where the fire that consumed their home was located." **R. 444,** Ex. 27) (italics in original).

Ms. Abendschein wrote to Plaintiffs' counsel on December 27, 2012, requesting documentation of the purchase price of the Parks' replacement home. **R. 242** (p. 152, Ll. 1-7) and **R. 446** (Exhibit 28). Mr. Parks testified that he provided the closing documents to his attorney as soon as he was asked for it. **R. 242-243** (p. 153, L. 19 – p. 154, L. 5). On January 22, 2013, Ms. Abendschein again wrote to Plaintiffs' counsel requesting documentation as to the price of the Parks' replacement home. **R. 448**. Mr. Parks recollected seeing the letter. **R. 243** (p. 154, Ll. 10-12). Even though Mr. Parks knew that Safeco needed the information to move forward with additional payments, he was not concerned that the information had not been provided. **R. 243** (p. 155, Ll. 7-14).

On January 23, 2013, responding to a letter from the Parks' attorney, Ms. Abendschein again noted that "[y]our client has not provided the necessary documents necessary in order for us to determine the replacement costs claimed." **R. 450**. Mr. Parks was also unconcerned at that time. **R. 244** (p. 158, Ll. 11-15). Ms. Abendschein again requested the information on the house

purchase on March 2, 2013. **R. 453**. Mr. Parks testified that he did not understand that the information had not been provided, but was, nevertheless, unconcerned. **R. 244** (p. 159, Ll. 10-21). In additional letters, dated March 29 and April 26, 2013, respectively, Ms. Abendschein again requested information on the cost of the Parks' replacement house. **R. 455** (Exhibit 33) and **R. 457** (Exhibit 34).

Finally, via a letter dated May 31, 2013, Plaintiffs' counsel forwarded copies of the closing documents on the Parks new home. **R. 459** (Exhibit 35). Mr. Parks had no idea how long his attorney had the records or when he took the documents to his attorney's office. **R. 246** (p. 166, L. 22 – p. 167, L. 4). Neither did Mrs. Parks. **R. 537** (p. 64, Ll. 1-3). On June 8, 2013, Safeco indicated it would pay an additional amount representing the difference between the replacement cost and the ACV. *See* **R. 486** (Exhibit 36). Safeco calculated the amount owed as $86,000 ($300,000 for the cost of new home, less $45,000 for the land, less the $169,000 previously paid). **R. 491** (Exhibit 39). Safeco paid that amount to the Parks. **R. 248** (p. 177, L. 6 – p. 178, p. 2). At that time, the Plaintiffs had not incurred any amount beyond the price of the Idaho Falls home to replace the Autumn Lane residence. **R. 537** (p. 64, Ll. 16-20). Mrs. Parks agreed that Safeco had paid for the totality of the replacement home. **R. 538** (p. 66, Ll. 1-4).

II.

STANDARD OF REVIEW

The standard for this Court's review of a trial court's ruling on a motion for summary judgment is the same standard as used by the trial court in ruling on the original motion. ***Shawver v. Huckleberry Estates, L.L.C.,*** 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). A party is entitled to summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." **I.R.C.P. 56(c)**. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response . . . must set forth specific facts showing that there is a genuine issue for trial." **I.R.C.P. 56(e)**.

Should this Court find the decision of the lower court to be based on an erroneous theory, the Court will nonetheless uphold the lower court's decision if any alternative legal basis can be found to support it. ***Martel v. Bulotti,*** 138 Idaho 451, 454-55, 65 P.3d 192, 195-96 (2003). In doing so, "[t]his Court may apply the law to undisputed facts de novo." ***Id.***, 138 Idaho at 455.

III.

ARGUMENT

A. APPELLANTS HAVE WAIVED THEIR ARGUMENT CONCERNING DIRECT FINANCIAL LOSS

Appellants' initial argument presented on appeal is that the District Court erred by not considering whether Appellants were entitled to their "direct financial loss" under the loss settlement provision for actual cash value (ACV). However, this was not an issue raised below. The only reference in the Appellants' summary judgment brief concerning "direct financial loss" pertained to section (1) the replacement cost provision of the Policy.[5] *See* **R. 929-930**. Similarly,

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[5] This provision provides:

(1) We will pay the full cost of repair or replacement, but not exceeding the smallest of the following amounts:

(a) the limit of liability under the policy applying to Coverage A or B;

(b) the ***replacement cost*** of that part of the damaged building for equivalent construction and use in the same premises as determined shortly following the loss;

in their reply brief to the District Court, Appellants again only referenced the "direct financial loss" language in section (1) of the replacement cost provisions of the Policy. *See* **R. 1044-1045**.

This Court has held that, with the exception of jurisdictional issues, an argument not raised below is waived on appeal. ***Minor Miracle Productions, LLC v. Starkey,*** 152 Idaho 333, 335, 271 P.3d 1189, 1191 (2012). Consequently, Appellants' contention that the Court erred by not considering "direct financial loss" under the ACV provisions of the Policy has been waived.

B. APPELLANTS DID NOT INCUR A LOSS EQUAL TO THE REBUILD ESTIMATE

Appellants contend that, per the Policy, they were entitle to recover "the direct financial loss" they incurred; and, further, that "the direct financial loss" was the amount estimated by Belfor to reconstructed the same house on the Appellants' lot on Autumn Lane in Pocatello. Unlike their argument before the District Court, Appellants' now cite to the provision of the Policy dealing with payment of the actual cash value of the home.

"Where the language used in an insurance policy is clear and unambiguous, the language must be given its plain, ordinary meaning." ***Farm Bureau Ins. Co. of Idaho v. Kinsey,*** 149 Idaho 415, 419, 234 P.3d 739, 743 (2010). "In insurance cases money becomes due as provided under the express terms of the insurance contract." ***Greenough v. Farm Bureau Mut. Ins. Co. of Idaho,*** 142 Idaho 589, 593, 130 P.3d 1127, 1131 (2006). The relevant portion of the Policy states:

(c) the full amount actually and necessarily incurred to repair or replace the damaged building as determined shortly following the loss;

(d) the direct financial loss you incur; or

(e) our pro rata share of any loss when divided with any other valid and collectible insurance applying to the covered property at the time of loss.

R. 330 (emphasis in original).

5. **Loss Settlement**. Covered property losses are settled as follows:

* * *

(4) You may disregard the ***replacement cost*** loss settlement provisions and make claim under this policy for loss or damage to buildings on an ***actual cash value*** basis but not exceeding the smallest of the following amounts:

(a) the applicable limit of liability;

(b) the direct financial loss you incur; or

(c) our pro rata share of any loss when divided with any other valid and collectible insurance apply to the covered property at the time of the loss.

You may still make claim on a ***replacement cost*** basis by notifying us of your intent to do so within 180 days after the date of loss.

R. 330 (emphasis in original). "Actual cash value" is a defined term in the Policy. It is defined as follows:

a. "***Actual cash value***"

(1) When damage to property is economically repairable, ***actual cash value*** shall mean the cost of materials and labor that would be necessary to repair the damage, less reasonable deduction for wear and tear, deterioration and obsolescence.

(2) When damage to property is not economically repairable or loss prevents repair, ***actual cash value*** shall mean the market value of property in a used condition equal to that of the lost or damaged property, less reasonable deduction for wear and tear, deterioration and obsolescence.

(3) Otherwise, ***actual cash value*** shall mean the market value of new, identical or nearly identical property, less reasonable deduction for wear and tear, deterioration and obsolescence.

(4) ***Actual cash value*** shall not include taxes or any expenses unless incurred following the loss.

R. 341 (emphasis in original).

The District Court held that Appellants' home was not repairable because it was completely destroyed in the subject fire. **R. 1063.** Thus, provision (2) is the applicable definition, which means that the actual cash value of the home was "the market value of [the] property in a used condition equal to that of the lost or damaged property," less wear and tear. This was amount determined by Mr. Robert Jones, and never challenged by the Appellants, and which Safeco paid to the Appellants in the summer of 2014. Nothing in the language cited above allows Appellants to obtain an amount in excess of the market value of their property under an *actual cash value* basis.

Moreover, the amount of the Belfor estimate was not a loss incurred by the Appellants. When addressing Appellants' "direct financial loss" argument raised as to section (1) of the Replacement Cost provision of the Policy, the District Court specifically rejected the argument that the repair estimate was a loss incurred by the Appellants. *See* **R. 1064-1065**. The District Court wrote:

> Black's Law Dictionary defines "incur" as "to suffer or bring on oneself (a liability or expense)." ... Here, Plaintiffs incurred or brought on themselves an expense to replace their destroyed home by buying a replacement home in Idaho Falls. The term "incur" is not subject to conflicting interpretations. In fact, Plaintiff [sic] has not proffered a conflicting definition of incur, but simply asserted the definition should include incurred repair estimates. However, repair estimates are clearly not expenses suffered or brought on oneself. Repair estimates are a rough calculation of the costs to repair something in the future, not a definite expense that is being incurred presently. ...

R. 1065. Appellants still offer no explanation as to why "incur" should include repair estimates in excess of the actual cash value of the house – costs never incurred by Appellants.

Appellants further contend that Mr. Jones valuation of the ACV was incorrect. But they have failed to provide expert evidence from an appraiser showing that Mr. Jones' valuation of the ACV was incorrect.

Appellants also contend that Safeco agreed to be bound by the Belfor estimate. However, that is not what was agreed by Safeco. Rather, Safeco indicated in its response to Appellants' counsel that "[t]his will confirm that the rebuild estimate provided by Belfor Restoration in the amount of $440,195.55 has been approved. We will pay the replacement cost of the dwelling up [to] $440,195.55 or the amount actually incurred, whichever is less." **R. 438.**

For the reasons cited above, the Court should affirm the District Court's grant of summary judgment.

C. THE IDAHO FALLS HOME REPLACED THE POCATELLO STRUCTURE

As noted in footnote 5 above, the Policy provides that "[w]e [i.e., Safco] will pay the full cost of repair or replacement, but not exceeding the smallest of the following amounts...." One of the measures listed was "the full amount actually and necessarily incurred to repair or replace the damaged building as determined shortly following the loss." *See* **R. 330.**

The contract language plainly states that Safeco would pay the smallest of several measures of the cost to repair or replace the structure; and not, as the Appellants argue, "replacement cost" irrespective of the other measures of damage. In this case, subparagraph (c) applies because "the full amount actually and necessarily incurred to ... replace the damaged building"—i.e., the purchase price of the replacement home—was less than "replacement cost."

Appellants also argue that there is nothing in the Loss Settlement provisions that reduces coverage for the total loss of a fully-insured home just because the insureds buy or build a smaller home. That is also incorrect. Rather, nothing in the Loss Settlement provisions requires

payment of policy limits. The provision that "[w]e will pay the full cost of repair or replacement, but not exceeding the smallest of the following amounts: ...," supports the payment based on the cost of the Idaho Falls home purchased by the Appellants. And, to the extent that the Appellants suggest that they received less than the value of the Autumn Lane home, Safeco would note that they received substantially more from Safeco than the market value of the Autumn Lane property.

In short, as the District Court correctly noted, the Belfor estimate is not the smallest of the measures of reimbursement, but that was the cost of the Idaho Falls home. **R. 1066.** The District Court also correctly determined that it was uncontroverted that the Appellants purchased the home in Idaho Falls to replace their residence that had burned in Pocatello. **R. 1066.** Thus, this Court should uphold the District Court's grant of summary judgment to Safeco.

D. THE APPELLANTS' FURTHER ARGUMENT ON "INCUR" IS IRRELEVANT IN LIGHT OF THEIR REPLACEMENT OF THE STRUCTURE BY PURCHASING ANOTHER HOME

"Point Three" of Appellants' argument is that the District Court erred by not applying a definition of "incur" that was favorable to the Appellants. This is merely another attempt by Appellants to argue that they had "incurred" the amount of the Belfor estimate to reconstruct the structure at Autumn Lane. As discussed in more detail above, the District Court correctly determined that the meaning of "incur" did not include the repair estimates. Contrary to the Appellants' arguments, the District Court nowhere in its opinion states that "incur" required Appellants to incur a debt. Moreover, the Appellants are arguing for more than the smallest of the allowable measure of damages under the Policy.

Appellants had a choice to rebuild the Autumn Lane home or purchase a replace property. They chose the latter. Having done so, the rebuild estimate became irrelevant to

determining damages. The Policy expressly provided for paying to the Appellants the smallest of several measures of damage, including the amount of another property purchased to replace the lost structure. Safeco did so, and fully complied with the terms of the Policy. Accordingly, the District Court's grant of summary judgment was correct, and should be upheld by this Court.

E. THE ARGUMENT CONCERNING "DETERMINED SHORTLY FOLLOWING THE LOSS" WAS NOT RAISED BELOW AND HAS BEEN WAIVED

The Appellants note that the relevant portion of the replacement cost provision of the Policy provides that one of the measure of allowable benefits is "the full amount actually and necessarily incurred to repair or replace the damaged building as determined shortly following the loss." Appellants attach a special significance to the phrase "determined shortly following the loss."

As noted above, an argument not raised before the District Court is waived and cannot be raised on appeal. ***Minor Miracle Productions, LLC v. Starkey,*** *supra,* 152 Idaho 333, 335, 271 P.3d 1189, 1191 (2012). Appellants made no argument before the District Court emphasizing the time period that a determination must be made. Accordingly, the argument has been waived.

F. THE APPELLANTS WERE NOT ENTITLED TO PAYMENT BEFORE THE AMOUNT OF LOSS WAS DETERMINED

Appellants' fourth argument is that "determined shortly following the loss" from the phrase "the full amount actually and necessarily incurred to repair or replace the damaged building as determined shortly following the loss," required Safeco to pay them the amount of the rebuild estimate, although Appellants had not determined whether to purchase or rebuild a property.

Apparently Appellants are arguing that they should benefit from their own delay in deciding whether to rebuild or purchase a separate property. To the extent that the Appellants

suggest that Safeco should have simply paid them policy limits or the "replacement cost" prior to Appellants making a decision as to whether they would replace or rebuild the house, that would run contrary to the provision that limited the policy to the smallest of the measures of loss under the Loss Payment provisions. Accordingly, the only option for payment until the Parks made up their minds was for Safeco to pay the ACV value of the lost home—just as it did.

Besides the concerns Appellants' argument raises about their duties under equity and the implied covenant of good faith and fair dealing, Appellants also ignore the requirement that the amount must still be incurred. Appellants never "incurred" a cost or expense for rebuilding the lost structure; certainly they had not entered into a contract to rebuild the property in question. Instead, they chose to purchase a replacement property approximately 5 months after the loss. If any party was potentially harmed by the delay, it was Safeco. However, Safeco has not argued that the valuation of the replacement home was not "determined shortly following the loss." Thus, the issue is moot.

If the Appellants are instead arguing that "determined shortly following the loss" require payment of the replacement cost to have been made earlier than it was, the Policy has separate, more specific provisions, regarding when payment would be made. *See* **R. 331**. Specifically, Safeco was not required to make payment until 30 days after it reached an agreement with Appellants, there was entry of a final judgment, or an appraisal award was filed with the Company. Payment was made prior to any of the foregoing events and, therefore, was timely.

Plaintiffs rely on a statement by their expert, Charles Miller, who purports to interpret certain portions of the insurance contract. Safeco pointed out to the District Court that Mr. Miller's opinion as to the interpretation of the contract is inadmissible. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

> experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(Underline added). Accordingly, an expert has no place in determining issues of law. And, in fact, the Idaho Supreme Court has held that expert opinion is irrelevant to a determination of an issue of law, such as interpretation of a contract. ***Howard v. Or. Mut. Ins. Co.,*** 137 Idaho 214, 219, 46 P.3d 510, 515 (2002).

The contract speaks for itself. The District Court correctly determined that Safeco had employed a correct measure of the amount owed under the Policy and timely paid that amount to Appellants. Thus, the Court should uphold the District Court's grant of summary judgment.

G. SAFECO WAS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIMS OF BAD FAITH AND ESTOPPEL

As the District Court correctly notes, a claim of bad faith is predicated on there being a breach of contract. **R. 1068.** To establish a claim for the tort of bad faith, the insured must show that: (1) the insurer intentionally and unreasonably denied or delayed payment; (2) the claim was not fairly debatable; (3) the insurer's denial or delay was not the result of good faith mistake; and (4) the resulting harm is not fully compensable by contract damages. ***Rizzo v. State Farm Ins. Co.,*** 155 Idaho 75, 305 P.3d 519, 527-28 (2013). The insured must also show that he was entitled to recover under the Policy. ***Id.*** at 528. That is, "[a]lthough the tort of bad faith is not a breach of contract claim, to find that [the insurer] committed bad faith in handling [the claim], there must also have been a duty under the contract that was breached." ***Weinstein v. Prudential Property and Cas. Ins. Co.,*** 149 Idaho 299, 315, 233 P.3d 1221, 1237 (2010). The plaintiff in a bad faith action bears the burden of proof as to all elements of the *prima facie* case. ***Robinson v. State Farm Mut. Auto. Ins. Co.,*** 137 Idaho 173, 177, 45 P.3d 829, 833 (2002). In this case, as the

District Court determined, there was no breach of contract. Thus, the claim of bad faith necessarily fails.

Appellants also maintain that payment of ACV in July 2014 acted as an estoppel or waiver on the part of Safeco. In ***Weinstein v. Prudential Property and Cas. Ins. Co.,*** *supra*, this Court held that where an insurer was able to determine a portion of an insured's damages that were justly due under the Policy, the insurer was obligated to make payment even if the claim was not fully adjusted. In this case, that is what Safeco did; and then paid the remainder due under the Policy once the Appellants' had purchased a replacement home and provided the documentation to Safeco. Thus, there was no estoppel or waiver on Safeco's part by advancing the ACV of the Pocatello home prior to the Appellants' decision to rebuild or purchase a replacement home.

H. APPELLANTS ARE NOT ENTITLED TO ATTORNEY'S FEES

Appellants' claim attorney's fees pursuant to Idaho Code 41-1839, which provides for attorney's fees when an insurer fails to pay the amount justly due within 30 days after the insured has furnished a proof of loss. **I.C. § 41-1839(1)**. Safeco paid the ACV within 30 days of receiving the valuation from Mr. Jones. Safeco paid the difference between ACV and the replacement cost within 30 days of receiving documentation of the purchase price of the Idaho Falls home. Consequently, Appellants are not entitled to attorney's fees under Idaho Code 41-1839.

I. SAFECO IS ENTITLED TO ITS COSTS AND FEES

The Idaho Code provides that in coverage disputes, "attorney's fees may be awarded by the court when it finds, from the facts presented to it that a case was brought, pursued or defended frivolously, unreasonably or without foundation." **I.C. § 41-1839(4).** In this case, the

language of the Policy was clear. All amounts justly due to the Appellants were timely and promptly paid. Appellants have argued issues on appeal that were not raised before the District Court, and failed to support its arguments with fact or law. Consequently, Safeco should be awarded its attorney's fees on appeal.

Safeco asserts that it should be awarded costs of appeal as a matter of right should it be found to be the prevailing party. **I.A.R. 40.**

IV.

CONCLUSION

For the reasons set forth above, the District Court's Decision and Order on the cross motions for summary judgment should be affirmed.

DATED this 11th day of January, 2016.

ANDERSON, JULIAN & HULL LLP

By _____
Mark D. Sebastian, Of the Firm
Attorneys for Defendant/Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of January 2016 I served a true and correct copy of the **RESPONDENT'S BRIEF** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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